FILED BY CLERK
OCT 28 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. VICTOR MANUEL PARRA, Appellant.	2 CA-CR 2007-0305 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200600738

Honorable Stephen M. Desens, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Julie A. Done — Phoenix
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 A jury found appellant Victor Parra guilty of possession of a narcotic drug for sale and possession of marijuana for sale. The trial court sentenced him to concurrent prison terms, the longest of which was 15.75 years. On appeal, Parra contends the trial court erred by admitting evidence of his financial status to establish motive and by not obtaining a personal waiver of his right to be present at trial. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the convictions. *State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). On October 17, 2006, Douglas Police Officer Valenzuela was on patrol in an unmarked vehicle. At approximately 7:45 p.m. he saw a gray sedan fail to stop at a stop sign. He followed the vehicle and activated his emergency lights after it abruptly changed lanes and turned onto another street. The driver failed to stop, and Valenzuela called for assistance. Valenzuela lost sight of the vehicle, but eventually found it abandoned. Additional officers arrived, but they could not locate the driver. Valenzuela found a wallet in the car, with Parra's Arizona and Mexico identification cards inside, and a "brown tape wrapped package," which was later determined to contain 113.73 grams of marijuana.

¶3 An hour and a half after the incident, the officers received a "suspicious person" call from someone in the same neighborhood where the car had been abandoned. Officer Ortega, who had been called to the scene previously, responded to the call and saw a man, later identified as Parra, on the roof of a shed. After he twice ordered Parra to show

his hands, Parra jumped off of the roof and attempted to run away. A few minutes later two other officers apprehended him, and Ortega identified Parra as the man who had jumped off the roof. Ortega later found a light-colored package on the shed's roof, which contained 66.07 grams of marijuana and four separate packages containing a total of 6.04 grams of cocaine.

¶4 A grand jury indicted Parra for possession of a narcotic drug for sale, having a weight of more than 750 milligrams; possession of marijuana for sale; and flight from law enforcement. On the state's motion, the trial court dismissed the flight charge without prejudice. At the commencement of trial, Parra's counsel advised the court that Parra was waiving his presence for jury selection. The following day, counsel stated he had spoken with Parra and he would not be attending. The jury found Parra guilty of the remaining charges and also found he had three historical prior felony convictions and had committed the current offenses while on probation for another offense. The court sentenced him to enhanced, presumptive, concurrent prison terms of 15.75 years for possession of a narcotic drug for sale and ten years for possession of marijuana for sale. This appeal followed.

Discussion

Financial evidence

¶5 Parra first argues the trial court abused its discretion by permitting the state to introduce evidence of his financial status. "[A]bsent a clear abuse of its considerable discretion," we will not disturb the trial court's ruling on the admissibility of evidence. *State*

v. Alatorre, 191 Ariz. 208, ¶ 7, 953 P.2d 1261, 1264 (App. 1998). And, we will not reverse if the error is harmless beyond a reasonable doubt. *State v. Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d 796, 805-06 (2000).

¶6 Rule 402, Ariz. R. Evid., provides, "All relevant evidence is admissible, except as otherwise provided." Relevant evidence is anything that has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Thus, "[t]he threshold for relevance is a low one." *State v. Roque*, 213 Ariz. 193, ¶ 109, 141 P.3d 368, 396 (2006).

¶7 Although he is not entirely clear, Parra appears to argue that the evidence of his financial status was irrelevant because a defendant's "lack of finances does not . . . prove motive for engaging in drug sales."[1] The state counters that evidence of Parra's reported annual income was relevant because its proportion to the $500 worth of drugs in his possession "made it more probable than not that the drugs were for sale." The state also posits that "evidence of [Parra]'s meager earnings was clearly relevant and probative of his motive to sell drugs and to prove his intent in doing so because he otherwise could not have afforded to be in possession of $500 worth of drugs."

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[1]Parra suggests on appeal that the financial evidence was "particularly prejudicial in light of the fact that it demonstrated that [he] required the services of a court appointed attorney." However, he fails to provide any argument or authority in support of this proposition. We therefore find it waived. *See* Ariz. R. Crim. P. 31.13(c)(vi), (e).

¶8 To the extent the state contends Parra's financial status alone is relevant to his motive and intent to sell drugs, we disagree. *See State v. Pereida*, 170 Ariz. 450, 453, 825 P.2d 975, 978 (App. 1992) (defendant's financial status relevant to knowledge and motive to sell marijuana where defendant's expenses far exceeded reported income); *see also United States v. Bartley*, 855 F.2d 547, 550 (8th Cir. 1988) (where pecuniary gain basic motive of charged crime, possession of large amounts of cash relevant); *United States v. Grandison*, 783 F.2d 1152, 1156 (4th Cir. 1986) (where defendant recently paroled and unemployed, recent expenditure of large amounts of cash relevant to charge of possession with intent to distribute); *State v. Styers*, 177 Ariz. 104, 115, 865 P.2d 765, 776 (1993) (evidence of financial trouble insufficient to establish beyond reasonable doubt defendant committed offense for pecuniary gain). However, to the extent the state is arguing that a defendant's finances are relevant when the value of drugs in the defendant's possession constitute a significant proportion of the defendant's reported income, the evidence may have some probative value. Nonetheless, we need not decide whether such evidence was relevant in this case, because even assuming it was irrelevant and erroneously admitted, any error in its admission would be harmless beyond a reasonable doubt. *See Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d at 805-06.

¶9 "Evidence is cumulative, and therefore error [in its admission] is cured only where the tainted evidence supports a fact otherwise established by existing evidence." *Id.* ¶ 40. And, "[a] proposition sought to be proven by tainted evidence is 'otherwise

established' only where we are convinced beyond a reasonable doubt that the tainted evidence was superfluous and could not have affected the verdict." *Id.* Here, ample other evidence was admitted that established the drugs were for sale. The state's criminalist testified that the aggregate amount of cocaine was 6.04 grams and was divided into four separate packages containing .94 grams, 3.04 grams, .56 grams, and 1.5 grams, each of which was a useable amount. The state's expert on the "for-sale" element testified that marijuana is usually sold in ten-gram increments, or "dime bags," and that in his experience, he had never seen the amount of marijuana found in this case held for personal use and "believe[d] that to be for sale." He also testified that six grams of cocaine was "a lot" for personal use and that he "would say it would be more for sale." Thus, evidence of Parra's finances was cumulative of other, properly admitted evidence, and "its admission could not have affected the verdict." *See id.*

Absence from trial

¶10 Parra next argues the trial court erred by not obtaining a personal waiver of his right to be present at trial and conducting his trial in absentia.[2] During trial, Parra's counsel

[2]Although Parra cites support for his general right to be present at trial in his brief on appeal, he has presented no authority in support of his primary argument that, under the circumstances of this case, the trial court was required to obtain a personal waiver of this right. Rule 31.13(c)(vi), Ariz. R. Crim. P., provides that opening briefs "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities . . . relied on." Briefs that fail to comply with these requirements may be stricken. Ariz. R. Crim. P. 31.13(e). Parra's argument with respect to this issue fails to comply with our briefing requirements; nonetheless, in our discretion, we will consider the issue raised. *See State v. Van Alcorn*, 136 Ariz. 215, 216-17, 665 P.2d 97,

repeatedly waived his presence, and Parra did not object to the trial having been held in his absence when he did appear for the sentencing hearing. Because Parra failed to object below, we review this issue for fundamental error only.[3] *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prevail under this standard of review, Parra must establish that error exists and that it caused him prejudice. *Id.* ¶ 20.

¶11 As best we understand Parra's argument, he contends "[a] defense attorney cannot simply waive his client's presence for trial without the court advising the defendant of the possible ramifications of his decision on the record, and securing a knowing, intelligent, and voluntary waiver." He cites *State v. Taylor*, 104 Ariz. 264, 451 P.2d 312 (1969), for the proposition that the trial court was "required to make a proper inquiry" into his absence at the time of trial. And he suggests the court should have had him transported to the courtroom "for purposes of waiving his presence." In *Taylor*, our supreme court noted, "A trial court which commences a trial in the absence of the defendant does so with

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98-99 (App. 1983). However, we strongly advise counsel in the future to support her arguments with relevant authority.

[3]The state argues that invited error applies in this case because Parra "was aware of his right to be present for trial, but chose to waive his presence for jury selection and trial." But, this does not address Parra's argument that his counsel's waiver on his behalf was invalid.

the knowledge that such absence may later be shown to be involuntary." *Id.* at 266, 451 P.2d at 314. But *Taylor* does not, as Parra seems to suggest, require a trial court to secure a defendant's personal waiver of the right to be present before proceeding in his absence.

¶12 "A defendant has a constitutional right to be present in the courtroom at every critical stage of the proceedings against him." *State v. Hall*, 136 Ariz. 219, 222, 665 P.2d 101, 104 (App. 1983); *see also Illinois v. Allen*, 397 U.S. 337, 338 (1970). But, this right is not absolute, and it "may be waived if the defendant voluntarily absents himself." *Hall*, 136 Ariz. at 222, 665 P.2d at 104; *Taylor*, 104 Ariz. at 266, 451 P.2d at 314; *see also* Ariz. R. Crim. P. 9.1.

¶13 In *State v. Collins*, 133 Ariz. 20, 23, 648 P.2d 135, 138 (App. 1982), we held that "counsel may waive th[e] right [to be present for peremptory challenges] and that the trial court may rely on counsel's waiver without requiring personal waiver by the defendant." *See also State v. Levato*, 186 Ariz. 441, 444, 444 n.3, 924 P.2d 445, 448, 448 n.3 (1996) (approving holding in *Collins*). And, "'[u]nless the circumstances are exceptional, a defendant is bound by his counsel's waiver of his constitutional rights,' even without a showing that the attorney consulted with the defendant." *See State v. Canion*, 199 Ariz. 227, ¶ 26, 16 P.3d 788, 795 (App. 2000), *quoting Collins*, 133 Ariz. at 23, 648 P.2d at 138.

¶14 These cases seem to support the state's argument that, under the circumstances of this case, counsel's waiver was sufficient. Nonetheless, in any event, Parra at no time

challenged his counsel's representation that Parra had given counsel authority to waive his presence. Parra did not assert at sentencing, nor does he on appeal, that he did not authorize counsel to waive his presence. Furthermore, while in custody, Parra signed the "Notice to defendant of effect of voluntary absence," and at trial, his counsel repeatedly informed the court he had spoken with Parra, who had waived his right to be present. Thus, there was no error, let alone fundamental error, in the trial court's conducting the trial in his absence.

Disposition

¶15 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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J. WILLIAM BRAMMER, JR., Judge